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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1018.

IN THE MATTER

of

JOSEPH ROSEN, *et al.*, Individually and trading as Adam Hebeler & Co., Bankrupts,

SIMON L. FISCH, as Trustee in Bankruptcy of Joseph Rosen, *et al.*, Bankrupts,

Petitioner,

STANDARD FACTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(Italics supplied.)

Our resistance to the certiorari petition might, in our respectful submission, well rest simply on the following two sentences of the concluding paragraph of Judge Goodrich's opinion for the unanimous Third Circuit Court of Appeals below (Record, 103a):

> "We are putting it (our decision), as we have been instructed to do, on the state law test as incorporated by the Supreme Court's interpretation of Section 60(a). (of the Bankruptcy Act) • • • We agree with the District Court in the conclusion reached upon the application of the law of the State of New Jersey.
> Affirmed."

This was the only issue presented. Therefore, unless this Court wishes to concern itself with the law of New Jersey and to conclude that Judge Goodrich misdeclared it (which, as will be hereafter pointed out, he definitely did *not* do), the petition should be denied.

However, both due respect for this Court and orderly procedure require that we briefly discuss and dispose of the petitioner's "reasons relied on for granting the writ" (Petitioner's brief, p. 7). It will be the office of the balance of this brief to do so, although, in the interests of logical treatment, not in the order in which they are stated.

POINT I.

Answering Reason 3 (Petitioner's Point III, Brief pages 10 and 11), the decision of the Court below is not only not in conflict with this Court's rationale in *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, but, to the contrary, scrupulously followed it.

At the very start of his opinion, and as its first authority, Judge Goodrich cites the Klauder case and repeats, verbatim and without the change of a comma, as the directing guide for the Circuit Court's decision in the case at

bar, this Court's pronouncement in the *Klauder* case (318 U. S. at p. 436) that

> "the command of Section 60a is to test the effectiveness of the transfer as against the Trustee, by the standards which applicable state law will enforce against a good faith purchaser." (Record, 96a)

As manifesting the directness of Judge Goodrich's approach, he said (Record, 98a):

> "The District Court discussed the cases and reached its conclusion on the basis of New Jersey law. In presenting the case to this Court the parties have made most of their argument on the New Jersey authorities. We are deciding the case on New Jersey law also • • •."

And, again (Record, 99a):

> "We come then to the measure of the non-notifying assignee's rights under New Jersey law."

The entire balance of Judge Goodrich's opinion unswervingly follows the rationale of the *Klauder* case as a beacon, ending with the sentence that the determination of this case was "reached *upon the application of the law of the State of New Jersey.*" (Record, 103a).

Of course, it could not have been otherwise. In both brief and argument, alike before the Referee, the District Court, and at the Circut Court of Appeals, the parties, if agreed on nothing else, were at one in urging that the case be determined, as it necessarily must, under the law of New Jersey. *Benedict* v. *Ratner* (1925) 261 U. S. 353; *Erie R. R. Co.* v. *Tompkins* (1938), 304 U. S. 64; *Fidelity Union Trust Co.* v. *Field* (1940), 311 U. S. 169; *Klauder* v. *Corn Ex-*

change National Bank & Trust Company (1943), *supra; McKenzie* v. *Irving Trust Co.* (1945), 323 U. S. 365.

Since no one ever contended otherwise, and the Circuit Court of Appeals decided the only issue presented solely on that basis, it is idle for the petitioner, at this late date, to contend that the decision of the court below is in conflict with the *Klauder* case.

POINT II.

Although petitioner's brief fails even to advert to the crucial matter, it is the settled New Jersey Law that the assignment of a chose in action is perfected at the time of its execution and delivery, and that notice to the debtor is not a requisite to such perfection. To put it briefly, New Jersey, in common with the majority of its sister states, has consistently rejected the doctrine of *Dearle* v. *Hall*, 3 Russ. 1, 38 Eng. Rep. (Full Reprint 1827) 475.

In deciding this case it was, of course, necessary for the court below to ascertain the applicable New Jersey law, even though it might not have been declared by the highest state courts (*Fidelity Union Trust Company* v. *Field, supra.*)

In a current of authority that is virtually unbroken, the New Jersey courts have consistently held that notice, in order to perfect the title of the assignee on an account receivable or other chose in action, is not necessary.

Luse v. *Parke* (1864), 17 N. J. E. 415;
Emley v. *Perrine* (1896), 48 N. J. L. 472;

Kamena v. *Huelberg* (1872), 23 N. J. E. 78;
Board of Education v. *Duparquet* (1892), 50 N. J. E. 234;
Cogan v. *Conover Manufacturing Co.* (Ch. 1905), 69 N. J. E. 358;
U. S. Fidelity & Gty. Co. v. *Newark* (1909), 76 N. J. E. 230;
Moorestown Trust v. *Buzby* (1932), 109 N. J. E. 409;

In so doing the courts of that state have followed the overwhelmingly prevailing American rule, which was also adopted by this Court in *Salem Trust Co.* v. *The Manufacturers Finance Company* (1924), 264 U. S. 182, at a time when, prior to the overruling of *Swift* v. *Tyson* (1842), 16 Pet. 1 by *Erie R. R. Co.* v. *Tompkins, supra,* this Court still felt itself at liberty to declare principles of general law in such matters.

Out of the wealth of New Jersey authority above cited, commencing with *Luse* v. *Parke,* decided over eighty years ago, and ending with *Moorestown* v. *Buzby,* handed down barely a decade ago, we shall refer specifically to, and quote from, only the following two:

In *U. S. Fid. & Gty. Co.* v. *Newark* (1909), 76 N. J. E. 230, the Court of Chancery through Howell, V. C., considered and dealt with the rights of parties arising out of a construction contract and a bond for performance on the part of the contractor. The case involved assignments of portions of the moneys payable under the contract, and the following contention was advanced by the complainant, as stated by the Court (p. 234):

> "The complainant claims that notice to the city was essential to the validity of the assignment, and

that such notice cannot be said to have been given until December 14, 1904, that being the date when the city counsel notified the city auditor that all his requirements had been met, this being based upon the complainant's construction of the provisions of the Stewart & Abbot contract above recited, and such construction being that no valid assignment of the Stewart & Abbot fund could be made without the consent of the city.

"From the foregoing facts I conclude: First, that the assignment took effect from the date of its execution and delivery; second, that no notice to the city was necessary to constitute the assignment a valid transfer of the fund; third, that the lien claimants are not in the position of bona fide purchasers without notice for value, and do not take priority over the assignment; fourth, that the consent of the city to the assignment was not necessary to give it force and validity."

It is significant that Vice-Chancellor Howell construed the opinion of Vice-Chancellor Pitney (later a Justice of this Court) in *Board of Education* v. *Deparquet*, 50 N. J. E. 234, as follows (pp. 234-235):

"Vice-Chancellor Pitney discusses the question of the priorities at length and with great learning, and decides that the assignment which was prior in point of execution and delivery took precedence over the latter attachment; that notice thereof to the debtor was not necessary to its validity and that the attaching creditor did not occupy the position of a *bona fide* purchaser without notice, and that he had no better title than the debtor himself had. This case was mentioned with approval by the court of errors and appeals in Miller *v.* Stockton, 64 N. J. Law (35

> Vr.) 614; and again in Cogan *v.* Conover Manufacturing Co., 69 N. J. Eq. (3 Robb.) 809, and may, therefore, be taken as an expression of the law of this state."

Therefore, under the law of New Jersey, an assignment of a chose in action is perfected when it is executed and delivered, and there is nothing further that an assignee must or need do in order to "perfect" his title to the assigned chose. Notification to the account-debtors does not assure any greater or more solid legal interest. The transfer is valid and complete when it is made, and, thereafter, the assignor has nothing left to assign to a second assignee.

The only discordant note is the case, decided in 1911 and standing alone, of *Jenkinson* v. *N. Y. Finance Co.*, 79 N. J. E. 247. At the threshold, it is to be noted that it did not deal with the assignment of an account receivable at all, but rather with the assignment of an interest in an estate, in respect of which there may be some point in requiring notice to the personal representative. However, the point may be passed because, as demonstrated by Professor Williston in Volume II of his work on *Contracts* (Rev. Ed.), Sec. 435, the 1932 case of *Moorestown Trust Co.* v. *Bueby, supra,* which *did* involve an account receivable and nothing else, overrules the *Jenkinson* case. And it may be noted parenthetically that Professor Williston's commentary is cited, with approval, in footnote 18 to Justice Jackson's opinion at page 441 in the *Klauder* case.

In its cumulative—and upon the petitioner, demolishing—effect, this weight of authority naturally and inevi-

tably led Judge Goodrich to the following conclusion (Record 101a):

> "We need not worry about creditors; they cannot, under New Jersey decisions, acquire rights superior to the assignee. (Citing Cogan *v.* Conover Manufacturing Co., *supra*). The Moorestown decision seems to go the whole way in holding that the second assignee, though a *bona fide* purchaser, does not either."

POINT III.

Answering Point I (p. 8) and Point IV (p. 11) of petitioner's brief.

In these points, the petitioner tells us that "the final decision in this cause is not limited to New Jersey, but is applicable to many other jurisdictions", and that "it is essential that Section 60a of the Bankruptcy Act be uniformly interpreted and applied throughout the United States." In order to avoid the repetition of argument, we shall treat these two points more or less together.

Of course, no one can quarrel with the proposition that the decision of *any* court applying Section 60a has national application, for the simple reason that such application is basically a federal question. The *Klauder* case specifically tells us that, in determining the rights and liabilities of the parties in any specific case, the applicable and commanding law is that of the state involved. Therefore, if in two separate cases the state laws differ, the end-results will likewise inevitably differ. But this in no way militates, as petitioner contends, against the uniform interpretation and application of Section 60a itself.

Concretely, in the *Klauder* case, at page 436, Justice Jackson, in holding for the Trustee, said:

> "The Circuit Court of Appeals has determined, and we accept its conclusion, that at all relevant times it was the law of Pennsylvania where these transactions took place, that because of the failure of these assignees to give notice to the debtors whose obligations were taken, a subsequent good-faith assignee, giving such notice would acquire a right superior to theirs."

Correspondingly, and applying the diametrically *contrary* New Jersey law to *this* case, Judge Goodrich, if he had not wished to avoid plagiarism, might well have said, in support of the Circuit Court's holding *against* the Trustee:

> "At all relevant times it was the law of New Jersey where these transactions took place that, despite the fact that this assignee did not give notice to the debtors whose obligations were taken, a subsequent assignee who gave such notice would acquire no rights superior to theirs."

POINT IV.

Answering petitioner's Point II (Brief, p. 9).

In this point, which consists of two short sentences, the petitioner makes glancing reference to the opinion of the District Court in re *Vardaman Shoe Co.* (1943), 52 Fed. Supp. 562, and states that it is in conflict with the decision of the court below in the case at bar.

We need not tarry long upon it, because, although much might be said against the soundness of the *Vardaman* case,

the opinion below in the case at bar expressly declined to pass upon the point. The very last two sentences of Judge Goodrich's opinion read (Record, 103a):

> "We need therefore express no opinion either way regarding the decision in In re Vardaman Shoe Co. which involved Missouri and Illinois law. We agree with the District Court in the conclusion reached upon the application of the law of the State of New Jersey."

However, it may be noted in passing that, in the *Vardaman* case, (1) the real parties in interest (the assignee-banks) were not before the court at all; (2) since the debtor there was reorganized, the case was never appealed and the whole question resultantly became moot; and (3) even the District Court's opinion rested upon pure speculation as to what the law of Illinois (one of the *two* potentially applicable states) *might* be, and did not thoroughly plumb that law, as does the opinion of the Circuit Court of Appeals with respect to the law of New Jersey (the *only* applicable state) at bar.

Conclusion.

It is respectfully submitted that the petition for the writ of certiorari should be denied.

Dated, Newark, N. J., February 28, 1947.

Max L. Rosenstein,
Attorney for Respondent.